PETITION NOT PRINTED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. [redacted] 53

WILLIAM EARL FIKES,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

BRIEF AND ARGUMENT

In Opposition to Petition for Writ of Certiorari.

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INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	1
Issues	2
Statement of the Case	3
Statement of the Facts	4
Brief and Argument	8
1. The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were systematically excluded from service on the grand jury which indicted the petitioner and on the petit jury which convicted him	8
2. The trial court did not commit reversible error by refusing to rule that the petitioner could present himself as a witness on voir dire to testify that a confession was involuntarily made without subjecting himself to general cross examination. A confession is not inadmissible solely because it was made after the arrest of the accused and while he was being held in jail	9

3. The guaranty of the Fifth Amendment to the Constitution of the United States that no person "shall be compelled in any criminal case to be a witness against himself," is not made effective against state action by the Fourteenth Amendment to the Constitution of the United States 10

Argument 11

Conclusion 21

Certificate 21

TABLE OF CASES CITED

Adamson v. California, 232 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223 ..... 11, 19

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286 ..... 8, 15

Alford v. United States, 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77 9

Bell v. Hood, 71 Fed. Supp. 813 11

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 ..... 8, 14

Burgess v. State, 256 Ala. 5, 53 So. 2d 568 ..... 10, 17

Carpenter v. State, 193 Ala. 51, 169 So. 531 ..... 10, 17

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629 ..... 8, 14

Davis v. State, 240 Ala. 365, 199 So. 547 10

Ex parte Whistler, 65 Fed. Supp. 40 11

Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043 ..... 9, 11

Fikes v. State of Alabama, (2nd Div. 335), 81 So. 2d 303 ..... 1, 3

Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716 11

Garbo v. United States, 145 Fed. 2d 966 10

Gast v. State, 232 Ala. 307, 167 So. 554 10

Gonzales v. Texas, 272 S. W. 2d 524 ..... 10, 17

Kennedy v. State, 186 Tenn. 310, 210 S. W. 2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659 8

Le More v. United States, 253 Fed. 887, Cert. den. 248 U. S. 586, 63 L. Ed. 434, 39 S. Ct. 184 10

Massachusetts v. Smith, 163 Mass. 411, 40 N. E. 189 10

Matthews v. United States, 145 Fed. 2d 823 10

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 11

People v. Price, 371 Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 661, 84 L. Ed. 463, 60 S. Ct. 94 8

Powers v. United States, 222 U. S. 303, 56 L. Ed. 448, 32 S. Ct. 281 9

Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054, 46 S. Ct. 566 9

Shipley v. United States, 281 Fed. 134, Cert. den. 260 U. S. 726, 67 L. Ed. 483, 43 S. Ct. 89 10

Simon v. United States, 123 Fed. 2d 80, Cert. den. 314 U. S. 694, 86 L. Ed. 555, 62 St. Ct. 411 9

Smith v. Mississippi, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900 ..... 9, 12

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674 11

Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077 9

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402 ..... 8, 14

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383 8

Twining v. New Jersery, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14 11

United States v. Buckner, 108 Fed. 2d 921, Cert. den. 309, U. S. 609, 84 L. Ed. 1016, 60 S. Ct. 613 10

United States v. Gross, 103 Fed. 2d 11 9

Witt v. United States, 196 Fed. 2d 285 ..... 9, 18

STATUTES CITED

Code of Alabama 1940, Title 14, Section 85 ..... 2, 3

Code of Alabama 1940, Title 30, Section 3, as amended by Act No. 243, Acts of Alabama 1943, page 197 ..... 13, 14

Code of Alabama 1940, Title 30, Section 21, as amended by Act No. 325, Acts of Alabama 1943, page 309 14

United States Code, Judiciary and Judicial Procedure, Title 28, Section 1257(3) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 378, Misc.

BRIEF AND ARGUMENT

In Opposition to Petition for Writ of Certiorari.

BRIEF AND ARGUMENT FOR RESPONDENT

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

William Earl Fikes v. State of Alabama, 2nd Division 335, 81 So. 2d 303.

II.

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Supreme Court of Alabama rendered May 12, 1955, rehearing denied June 23, 1955, under the provisions of Title 28, Section

1257(3), United States Code, Judiciary and Judicial Procedure. (See petitioner's brief, pages 1, 2 and 3).

III.

ISSUES

The petition in this case raises the following issues:

1. Whether the petitioner, who stands convicted in the State of Alabama of burglary in the first degree, as defined by Title 14, Section 85, Code of Alabama 1940, was indicted by a grand jury and convicted by a petit jury from which Negroes were systematically excluded from jury service, thereby being denied the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States. The State of Alabama contends that Negroes were not systematically excluded from jury service on said juries.

2. Whether the petitioner, who stands convicted in the State of Alabama of burglary in the first degree, as defined by Title 14, Section 85, Code of Alabama 1940, was denied the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States when the trial court refused to rule, upon motion made by the petitioner, that said petitioner could take the witness stand to testify on voir dire that a confession was involuntarilly made without subjecting himself to general cross examination. After this refusal by the trial court

the petitioner did not take the witness stand. The State of Alabama contends that due process of law was not denied to the petitioner by the ruling of the trial court.

IV.

STATEMENT OF THE CASE

The petitioner was tried and convicted in the Circuit Court of Dallas County, Alabama, under an indictment charging the offense of burglary in the first degree (Title 14, Section 85, Code of Alabama 1940). Before entering upon the trial in said Circuit Court, the petitioner filed motions to quash the indictment and venire. After hearing evidence on each of these motions, the trial court overruled each of them. Petitioner entered a general plea of "not guilty," and a plea of "not guilty by reason of insanity," and was found guilty as charged in the indictment by the jury. The jury fixed punishment at death by electrocution. The trial court overruled the petitioner's motion for a new trial and sentenced him in accordance with the verdict of the jury. The trial proceedings were reviewed by the Supreme Court of Alabama, which affirmed the judgment of conviction and the sentence imposed. See *William Earl Fikes v. State of Alabama* (2nd Division 335, May 12, 1955) 81 So. 2d 303. On November 19, 1955, petitioner filed with the Supreme Court of the United States his petition for writ of certiorari directed to the Supreme Court of Alabama. See *William Earl*

Fikes v. State of Alabama, Docket No. 378, Misc., October Term, 1955, Supreme Court of the United States.

V.

STATEMENT OF THE FACTS

The evidence was that on Friday night about "10:20" of April 24, 1953, Mrs. Jean Heinz Rockwell of Selma, Alabama, was asleep in her bedroom. She had two babies, one of whom was in an adjoining bedroom and the younger in her room. Her husband was not at home. When she awakened around "10:15" a Negro man was sitting on her as she lay in bed. She knew he was a Negro but did not see his face as it was covered. She could not identify petitioner as that person. He had a knife belonging to her which he had gotten from the kitchen. He told her he was going to kill her. She began struggling to get off the bed and with him holding on to her she managed to get into the hall (where there was a light) adjoining her room. She went all the way down the hall and into the living room in the front of her apartment. There he fell over a stool and fell on Mrs. Rockwell. She was screaming and he threatening to kill her with the knife at her throat, and he told her "to straighten out." She grabbed the knife and got it out of his hand. He jumped up and ran down the hall and out through the kitchen and back door. She fell up against the back door and locked it. It was locked when she went to bed but was open when he ran out of it. The kitchen was in the middle

of the apartment between the dining room and bedrooms. There was an outside entrance to the kitchen with a screen and wooden door. The screen to the window was also open and the window up. There were holes in the screen over by the latches, but these holes were not there before he entered the apartment.

During the spring of 1953, the City of Selma, Alabama, was terrorized because of the activities of a burglar-rapist in this city. Sometime around midnight of Saturday, May 16, 1953, the petitioner was taken into custody by a private citizen, Jake Youngblood, and taken to a gasoline service station where he was held until the police arrived. The police took the petitioner into custody at the request of said Jake Youngblood and placed him in the city jail.

The petitioner was "booked" when he was taken to the jail but was not charged with any crime at that time. On Sunday morning, May 17, 1953, the petitioner was questioned by Capt. Wilson Baker and Chief Mullen of the Selma Police Department. That afternoon Capt. Baker rode the defendant around in the City of Selma and questioned him with reference to the homes which had recently been broken into.

On Monday afternoon, May 18, 1953, the petitioner was carried to Montgomery, Alabama, and placed in Kilby Prison.

The petitioner was held at Kilby Prison for about a week for the City of Selma, Alabama. There

is some evidence that he was not allowed to have any of his family or friends visit during this period. However, his father did admit that he visited the petitioner one time during his stay at Kilby Prison.

The petitioner was subsequently indicted by the Grand Jury of Dallas County, Alabama, for burglary in the first degree and a great amount of evidence was taken on the trial of this cause on motions to quash the venire and the indictment on the grounds that his constitutional rights had been denied because of the lack of proportional representation of Negroes on the grand and petit juries.

The evidence on these motions showed that a far greater number of the names of white men were placed in the jury box in Dallas County than names of Negroes. However, this evidence showed that the Jury Commission of Dallas County had recently made great effort to secure the names of qualified Negro jurors to be placed in said jury box. The evidence further showed that a great many names of Negroes had recently been placed in said jury box.

The evidence in the trial of the merits in this cause showed that the petitioner made a confession on a tape recorder while he was held in Kilby Prison. Another confession was also made at Kilby Prison, which was typewritten by the secretary to the warden, and signed by the petitioner in the presence of the officers who had questioned him after said confession had been read to him. Both of these confes-

sions were introduced into evidence over the petitioner's objections.

Over the petitioner's objections the State was allowed to introduce evidence as to the identity of the petitioner by Mrs. Deloris Stenson, James Winfred Brown and Mrs. Claude Binford. The testimony of Mrs. Stenson and Mrs. Binford tended to connect the petitioner with other crimes. However, in his oral charge to the jury, the trial judge made it very clear that the testimony of these witnesses were introduced only for the purpose of showing the identity of the petitioner and for no other purpose.

VI.

BRIEF AND ARGUMENT

1. The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were systematically excluded from service on the grand jury which indicted the petitioner and on the petit jury which convicted him.

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397

Kennedy v. State, 186 Tenn. 310, 210 S. W. 2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659

People v. Price, 371 Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 551, 84 L. Ed. 463, 60 S. Ct. 94

Smith v. Mississippi, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900

Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043

2. The trial court did not commit reversible error by refusing to rule that the petitioner could present himself as a witness on voir dire to testify that a confession was involuntarily made without subjecting himself to general cross examination. A confession is not inadmissible solely because it was made after the arrest of the accused and while he was being held in jail.

Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077

Witt v. United States, 196 Fed. 2d 285

Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054, 46 S. Ct. 566

Alford v. United States, 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77

United States v. Gross, 103 Fed. 2d 11

Powers v. United States, 222 U. S. 303, 56 L. Ed. 448, 32 S. Ct. 281

Simon v. United States, 123 Fed. 2d 80, Cert. den. 314 U. S. 694, 86 L. Ed. 555, 62 S. Ct. 411

Massachusetts v. Smith, 163 Mass. 411, 40 N. E. 189

Gonzales v. Texas, 272 S. W. 2d 524

Le More v. United States, 253 Fed. 887, Cert. den. 248 U. S. 586, 63 L. Ed. 434, 39 S. Ct. 184

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Shipley v. United States, 281 Fed. 134, Cert. den. 260, U. S. 726, 67 L. Ed. 483, 43 S. Ct. 89

Matthews v. United States, 145 Fed. 2d 823

Gast v. State, 232 Ala. 307, 167 So. 554

Carpenter v. State, 193 Ala. 51, 69 So. 531

Davis v. State, 240 Ala. 365, 199 So. 547

Burgess v. State, 256 Ala. 5, 53 So. 2d 568

3. The guaranty of the Fifth Amendment to the Constitution of the United States that no person "shall be compelled in any criminal case to be a witness against himself," is not made effective against state action by the Fourteenth Amendment to the Constitution of the United States.

Twining vs. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149

Adamson v. California, 232 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716

Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043

Bell v. Hood, 71 Fed. Supp. 813

Ex parte Whistler, 65 Fed. Supp. 40

VII.

ARGUMENT

A.

In his petition for writ of certiorari to review the judgment of the Supreme Court of Alabama, the petitioner contends that Negroes were systematically excluded from jury service in Dallas County, Alabama, and that because of such exclusion he was denied the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the

United States in his trial and conviction for the crime of burglary in the first degree. Before he was placed on trial, he filed motions to quash both indictment by the grand jury and the petit jury panel. Alleged systematic exclusion of Negroes from the jury rolls was the basis for these motions. The testimony of a great number of witnesses was heard by the trial court on said motions. The motions were overruled and the trial proceeded. We submit that this ruling was not error and involves no denial of the due process of law guaranteed by the Fourteenth Amendment, for the reason that the proof completely failed to show the systematic exclusion of Negroes from the jury rolls of Dallas County, Alabama.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged discrimination is on the one making the allegation. *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900. This burden was not met by the petitioner.

The evidence showed that prior to the trial of the petitioner in the case at bar, an indictment charging him with the offense here involved, was quashed by the trial court upon the motion of the petitioner. This motion to quash the prior indictment alleged that the indictment was found by a grand jury from which Negroes had been systematically excluded. After this prior indictment was quashed, the jury commissioners of Dallas County,

Alabama, made a great effort to prepare a jury roll and jury box from which Negroes were not systematically excluded. In October, 1953, 1500 names were placed in said jury box and on said jury rolls of which 250 to 300 were Negroes. The venire, which furnished the grand jury and petit jury here involved, was drawn from the jury box after said jury commissioners had completed their work in October, 1953.

The evidence further shows that the jury commissioners of Dallas County, Alabama, in performing their work in October, 1953, adopted a policy not to include those persons, white and Negro, qualified for jury service on the jury roll who were exempt from such service by reason of Title 30, Section 3, Code of Alabama 1940, as amended by Act No. 243, Acts of Alabama 1943, page 497. The evidence does not show that any Negro in Dallas County, Alabama, qualified for jury service and not exempt therefrom, was not included on the jury roll prepared in October, 1953.

As pointed out by the Supreme Court of Alabama in its opinion in the case at bar, there was direct positive evidence showing an effort in good faith to have the Negro race fairly represented on the jury roll prepared in October, 1953. It may be that Negroes were systematically excluded from prior jury rolls in Dallas County, Alabama. However, the indictment and trial here involved are controlled by the jury roll prepared in October, 1953.

In *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 469, 77 S. Ct. 397, the defendant contended that discrimination was proved by evidence that thirty per cent of those eligible as jurors were Negroes while only seven per cent of the names in the jury box were names of Negroes. A majority of the court held that no discrimination against Negroes in the selection of the jury had been shown.

In Alabama jury commissioners are required to place on the jury rolls "the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character, and sound judgment." Title 30, Section 21, Code of Alabama 1940, as amended by Act No. 325, General Acts of Alabama 1943, page 309. There are numerous exemptions from this mandate. Title 30, Section 3, Code of Alabama 1940, as amended. The petitioner here presented no testimony as to how many Negroes had been exempt by reason of Title 30, Section 3, Code of Alabama 1940, as amended, or how such exemptions might affect the ratio of Negroes to whites on the jury roll. In the absence of evidence to the contrary, there is a presumption or inference that the officers in charge of the selection and summoning of the jury have performed their duty fairly and justly without discrimination against any eligible class or race. *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402. No evidence of such discrimination is presented here.

The case of *Cassell v. Texas*, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629, is no basis for a reversal

of the case at bar. In that case the court found that the jury commissioners chose for the jury roll only those persons they knew and that they knew no eligible Negroes in an area where Negroes made up a large proportion of the population. In the instant case, there is no testimony that the jury commissioners "knew no eligible Negroes." In fact, as pointed out above, great effort was made by the jury commissioners to prepare a jury roll from which Negroes were not systematically excluded before the venire, which formed the grand jury and petit jury in this case, was drawn.

Respondent earnestly contends that the trial court's action in denying the motions to quash the venire and the indictment was rightly affirmed by the Supreme Court of Alabama. As was stated in *Akins v. Texas*, 325 U. S. 398, 401, 89 L. Ed. 1692, 65 S. Ct. 1276:

> "While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, (citing cases) we accord in that examination great respect to the conclusions of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

B.

Counsel for petitioner in brief points out that this court always takes into account, in weighing the involuntariness of a confession, the race, lack of education, length of internment, type of crime and frequency, and length of interrogation.

We submit that the evidence in the case at bar falls very short of showing that the confessions introduced into evidence were obtained by threats or coercion in any manner. The evidence shows that the petitioner was always fully advised of his rights and was not misled in any manner by the officers to whom he confessed.

Petitioner further argues that the trial court should have been reversed by the Supreme Court of Alabama for refusing to rule, before the petitioner appeared as a witness, that he could testify "for the purpose of refuting certain allegations by the State, with reference to the voluntary nature of what purports to be certain extra-judicial admissions and for no other purpose," without subjecting himself to general cross examination.

As shown by the cases cited in the second proposition of law contained in Part VI of this brief, both the federal courts and state courts hold that the scope and extent of cross examination of an accused is within the trial court's sound discretion, the exercise of which is not reviewable, except for abuse. This

is certainly the rule in Alabama. See *Burgess v. State*, 256 Ala. 5, 53 So. 2d 568.

In *Carpenter v. State*, 193 Ala. 51, 69 So. 531, the Supreme Court of Alabama held that if a defendant voluntarily takes advantage of the right to testify in his own behalf, in a criminal case, he thereby waives his constitutional protection against answering questions touching the merits of the case which might tend to incriminate him.

In *Gonzales v. Texas*, 272 S. W. 2d 524, the Court of Criminal Appeals of Texas said that when a defendant takes the stand as a witness, he is subject to the same rules as any other witness. He may be contradicted, impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, cross-examined as to new matter and treated in every respect as any other witness testifying on behalf of the defendant, except where some statute forbids certain matters to be used against him, such as proof of his conviction on a former trial of the present case, for failure to testify on a former trial or hearing, and the like.

The case at bar does not present, for the determination of this court, a question as to whether certain inquiries might be made of the defendant when he takes the witness stand upon voir dire as to the voluntariness of a confession. The question presented here is whether the defendant has a right before he takes the witness stand, upon such voir dire examination, to limit his cross-examination to ques-

tions concerning only the actions and statements made by the petitioner and others at the time and place the confession was made.

A question very similar to the one involved in this case was considered by the United States Court of Appeals, Ninth Circuit, in *Witt v. United States*, 196 Fed. 2d 285. The opinion of the court reads in part as follows:

> "The judge heard evidence in the jury's absence concerning the circumstances under which the confession was made. The Bureau agent who had obtained it testified, and appellant likewise was sworn and gave his version of the circumstances. The judge thereupon ruled that the confession was voluntary and allowed its introduction after the agent had again related the circumstances in the presence of the jury. *Appellant claims that he was thereafter refused permission to take the stand in the jury's presence for the limited purpose of testifying as to the voluntary aspect of the confession. We do not so understand the record. The court went no further than to suggest that if appellant testified he would subject himself to cross-examination. Appellant was obviously free to take the stand and speak concerning any material matter inquired of him by his counsel. He could not well ask that the court guarantee him in advance that he would be asked no embarrassing questions on cross-examination if he did so.* If he had taken the stand and the court had per-

mitted undue latitude in his cross-examination, he would have had something of substance to complain about." (Emphasis supplied)

In the case at bar, there is no way for the court to know what would have been asked the petitioner had he taken the witness stand after the ruling of the court or whether there would have been any cross examination of the petitioner at all. For this reason, we strenuously insist that the question as to whether an accused is entitled to a limited cross examination when he takes the witness stand for the purpose here involved is not properly raised by the record in this case.

For the above reasons, we submit that the Supreme Court of Alabama correctly affirmed the ruling of the trial court here involved and that this Court should not grant a writ of certiorari because of said decision.

C.

This Court has held that a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless it offends some principle of justice ranked as fundamental.

This Court has also held that the privilege against self incrimination is not inherent in the right to a fair trial and is, therefore, not protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States. See *Adamson*

v. California, 232 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223.

For the above reasons, we respectfully submit that the trial court committed no reversible error by refusing to let the petitioner take the stand on voir dire to present evidence that his confession was involuntarily made without subjecting himself to general cross examination.

Since the Fourteenth Amendment does not prevent a state from compelling a witness to testify against himself in a criminal case, the State of Alabama is free to compel such testimony, unless by doing so, some principle of fundamental justice is offended.

Under the facts of the instant case, no principle of fundamental justice was offended by the ruling of the trial court. In Alabama an accused has the right not to testify in a criminal prosecution. However, if he elects to take the witness stand for any purpose, we submit that the State of Alabama may require him to be subjected to general cross examination without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VIII.

CONCLUSION

For the foregoing reasons, we submit that the petitioner was indicted, tried, convicted and sentenced properly, and that the due process clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, the writ of certiorari in this case should be denied.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE

This is to certify that I have this day served a copy of the foregoing brief and argument upon Hon. Peter A. Hall, one of the attorneys for appellant, by placing a copy in the United States mail, postage prepaid, properly addressed to him at 1630 4th Avenue, North, Birmingham, Alabama.

On this ..... day of January, 1956.

ROBERT STRAUB
Assistant Attorney General of Alabama